UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

E/CN.4/1998/153
31 March 1998

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS
Fifty-fourth session
Agenda item 8

QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

Letter dated 31 March 1998 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations Office at Geneva addressed to the Chairman of the fifty-fourth session of the Commission on Human Rights*

I have the honour to refer to the report of the Special Rapporteur on the Independence of judges and lawyers on his mission to the United Kingdom of Great Britain and Northern Ireland in October 1997 (E/CN.4/1998/39/Add.4). I enclose an official response from my Government and request that it be circulated as an official document of the Commission on Human Rights.

(Signed): RMJ LYNE
Ambassador
Permanent Representative

* The annex is reproduced as received, in the language of submission only.

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RESPONSE TO THE CONCLUSIONS AND RECOMMENDATIONS TO THE UN SPECIAL RAPPORTEUR'S REPORT.

We welcome the report of the UN Special Rapporteur on the Independence of Judges and Lawyers, Mr Cumaraswamy, following his visit to the United Kingdom in October 1997. Britain fully supports the UN's human rights machinery of which the system of Special Rapporteur's is a key element. We are pleased that Mr Cumaraswamy has noted the positive steps that the United Kingdom has taken to ensure the independence of its judiciary but are concerned about his comments about the harassment of defence lawyers. We are examining these closely. Meanwhile, we are forwarding some information relating to specific points made in the Special Rapporteur's report.

The Harassment And Intimidation Of Solicitors.

We have considered carefully the Special Rapporteur's comments on "the harassment and intimidation of solicitors". The conclusion, in paragraph 90, is " that the RUC has engaged in activities which constitute intimidation, hindrance, harassment or improper interference".

This obviously is a matter of considerable concern. We would ask, however, to be provided with the specific details on which the allegations are made. If there is new evidence we will want to ensure that this is looked into.

The current system for investigation of complaints is by the police, but a separate department within the RUC carries this out, overseen by the Independent Commission for Police Complaints (ICPC). In more serious cases the ICPC will supervise the case. This is a significant power.

The Commission has to approve the appointment of the investigating officer and can direct and control the conduct of the investigation.

At the end of the investigation the Commission is required to issue a statement of satisfaction or otherwise. They also look at the discipline side and can direct disciplinary charges.

Nevertheless the Government, and indeed the ICPC, recognise there are weaknesses in the current system which are failing to inspire public confidence.

The Government, therefore, has introduced the Police (Northern Ireland) Bill which provides for a :

- An Police Ombudsman to be appointed who will have complete control of the complaints process.
- The Ombudsman decides what is or is not a complaint. He may call himself in even where there is no complaint, if this is in the public interest.
- The Ombudsman to be wholly independent.

These reforms have received widespread support, and are aimed at building greater public confidence in the system (while also inspiring police confidence).

An area often criticised, and seen as a reason for the relatively low number of substantiated cases, is the standard of proof. The Government is currently considering a report by the Home Affairs Select Committee which recommended a change to the balance of probabilities.

In the meantime, while change is awaited, we have been encouraging people to recognise what the Government is seeking to do and to co-operate with the system as it exists. We note that the Special Rapporteur recommends such co-operation.

Concerning Access To Lawyers in England and Wales

In paragraph 93(a) and (b) of his report the Special Rapporteur recommends that Section 14 of the Prevention of Terrorism Act should be amended to prohibit the deferral of access of counsel to their clients and that the right to have a solicitor present during police interviews should be respected.

In practice, access is rarely deferred. The Metropolitan Police are not aware of any instances in England and Wales in the past two years where access to a solicitor of choice has been delayed.

The Government is to publish later in the year a consultation document with proposals for permanent UK-wide counter-terrorism legislation. This will look at all aspects of the current emergency legislation, including conditions of detention.

Closed Legal Visits

In paragraph 93(c) of his report the Special Rapporteur recommends that the practice of closed visits in England and Wales should be discontinued.

The Prison Service recognises the implications of imposing closed visits on a prisoner held in a special secure unit (SSU). Only those prisoners who are held to constitute the greatest danger to the public and have been categorised as exceptional risk are subject to closed visits. There are currently six exceptional risk prisoners in England and Wales. These prisoners are held in the Whitemoor SSU. The SSU at Full Sutton is currently out of use. The building at Belmarsh which housed the SSU is now used to hold high risk prisoners.

There are no terrorist prisoners among the six men currently being held in the SSU at Whitemoor. All of the prisoners currently held in SSUs have been classified as exceptional escape risk: they could have access to substantial outside assistance in any escape attempt and would constitute a very real threat should they escape.

Rule 37 of the Prisons Rules 1964 sets out the requirements for visits by legal advisers. Legal visits must take place in sight but out of hearing of prison staff. The closed visits policy is consistent with this. A prison officer remains in the visits room during

a domestic visit but outside during legal visits. Arrangements have been made to ensure that legal visits can be conducted properly under secure conditions and to ensure that documents can be transferred securely and confidentially between legal advisor and prisoner. There were some practical difficulties with the operation of the closed visits facilities immediately after their introduction but these were quickly resolved.

The closed visits facilities have been inspected by an independent barrister on a number of occasions. He has concluded that the facilities do not impede legal conferences.

The introduction of closed visits in 1995 was challenged in the courts. The judicial review of the policy had three grounds:

- that there was no power to impose closed visits;
- that the decision to do so was unreasonable and
- that the closed visits facilities were unsatisfactory.

The Court found in favour of the Prison Service on all three grounds but instructed it to keep the policy under review.

The issue went to appeal. In February 1997 the Court of Appeal also found in favour of the Prison Service. The Court found that, although in normal circumstances the imposition of closed visits might make communication more difficult, closed visits did not prevent communication. The Court noted that the Prison Service had taken steps to ensure that reasonable facilities were available and to improve the facilities when faults were identified. The Judgement made particular mention of the Prison Service's willingness to allow open visits where representations on behalf of prisoners' legal advisers had shown that in specific cases the facilities did not allow reasonable communication between prisoner and lawyer.

The closed visits policy applies to all visitors. In addition to the visitors who may be tempted to smuggle in items voluntarily there is also the risk that other visitors may be conditioned, threatened or intimidated to smuggle in articles. Legal visits are in a special category but where there is a risk that a visitor may, for example, be intimidated into bringing contraband into prison, this risk applies as much to solicitors and their staff as it does to other visitors. The policy must therefore include them.

The policy protects legal representatives and their staff from having pressure put on them and eliminates the security risk. Closed visits were introduced to remove the risk of unauthorised objects being passed from visitor to prisoner whether voluntarily or by coercion. The introduction of the policy has acted as a deterrent to prisoners and remains a necessary security measure.

The current closed visits policy provides that:

- exceptional risk prisoners should be subject to closed visits;
- open visits may be granted in exceptional circumstances with the approval of the Director of Dispersals;
- the decision whether to grant open visits should be taken in the light of the particular circumstances of each case;
- in particular, for legal visits in connection with criminal proceedings, the Prison Service, when deciding that there are exceptional circumstances, will take into account the need to ensure that there is a fair trial.

Although significant improvements have been made to security in prisons, there is still no acceptable alternative to closed visits which can guarantee that objects cannot be passed between prisoner and visitor.

The policy provides for open visits in exceptional circumstances. Exceptional circumstances are not defined. However, specific reference is made in the policy to the need to ensure that prisoners are given a fair trial. Regular open legal visits have been granted to a number of defendants in the past year to allow them to prepare for trial. Reasons for granting such visits have included the need to examine large numbers of documents and for groups of defendants to confer jointly with their legal representatives.

Her Majesty's Chief Inspector of Prisons (HMCIP) has previously expressed an interest in this area but it is understood that he does not now intend to pursue the issue. The policy has been reviewed on a number of occasions since its introduction. The Prison Service's assessment remains that closed visits are necessary on security grounds for those few prisoners who are classified as exceptional escape risk. The Prison Service will continue to keep the policy of closed visits under review to ensure that it remains the appropriate response to the threat posed by exceptional risk prisoners.

<u>Concerning Access to Lawyers in Northern Ireland</u>

2. In paragraphs 92 and 93 of his Report, the Special Rapporteur concludes that a defendant's right to Counsel is of paramount importance to guarantee his/her right to a fair trial and to protect against potential abuse. Therefore, amongst other things, he recommends that the right to have a solicitor present during police interrogation should be respected.

3. All suspects do have a right to legal advice. Access may however be delayed for up to a maximum of 48 hours only if the police have a reasonable suspicion that allowing access to lawyers would prejudice the investigation. The reason for this is that lawyers, however unwittingly, sometimes may be used to convey information

or be forced to reveal it under duress to the outside, which may prejudice the outcome of an investigation. Once the reasons for delay and access have expired the suspect is always told that he may exercise his right to legal advice. It is worth pointing out that in 1997 only 33 requests were delayed out of 512 requests made overall. In other words the percentage actually deferred was approximately 6%.

4. As for solicitors' presence during interview, there is nothing in law to say that solicitors should or should not be present. On this basis, the police consider on its merits each individual request for a solicitor to be present.

Concerning Video And Audio-Recording Of Police Interviews

In his Report, Mr Cumaraswamy recommends that as a matter of urgency the Government should install video and audio recording equipment in all holding centres in Northern Ireland, and that the tapes of such recordings should be available to Counsel upon request.

The silent video recording of police interviews with terrorist suspects came into operation from midnight on 10 March 1998. The introduction of audio recording, for which provision is made in the Emergency Provisions Bill currently passing through Parliament, will follow as soon as possible. Copies of silent video tapes will be made available to the person who was previously detained and/or his solicitor, and as appropriate, to the investigating authority, in the following circumstances:

(a) where the tape or part of it would otherwise have to be disclosed in criminal or civil proceedings;

(b) where the person who was previously detained has made a complaint in writing of ill-treatment against any of the interviewing officers; and the complaint specifies the nature of the alleged ill-treatment and approximately when it occurred. In such circumstances, upon providing details of the complaint, the relevant parts of the tape shall be made available for interviewing and upon identifying that part(s) of the tape which he alleges supports the complaint, the person who was previously detained and/or his solicitor shall be entitled to receive a copy of the relevant part(s). If the complaint is received in respect of a specific interview, only that part of the master tape shall be made available for viewing/copying.

Concerning The Murder Of Patrick Finucane

In his report Mr Cumaraswamy urges the Government to appoint a judicial inquiry to investigate the murder of Patrick Finucane in 1989. Mr Cumaraswamy urges the setting up of a tribunal similar to that set up to look in the events of 30 January 1972 known as Bloody Sunday. A Tribunal under that Act can only be established if there is an need to look at a matter of urgent public importance, the information given to the Government last year raised sufficient concern to justify an inquiry.

This is not the case with the murder of Mr Finucane. There was a police inquiry that led to three people being charged with possession of the weapon that was used in the killing of Mr Finucane. A further inquiry was conducted by Mr John Stevens following further allegations. In February 1995, having considered the report before him, the Director of Public Prosecutions for Northern Ireland concluded that there was insufficient evidence to warrant the prosecution of any person for the murder. Unless new evidence is brought to light there can be no justification for another inquiry although the police file remains open.

Concerning The Emergency Legislation

A Right to Silence

Under the Criminal Evidence (Northern Ireland) Order 1988, the defendant is entitled to remain silent. Silence does not constitute a criminal offence or contempt of court and a defendant cannot be convicted on the basis of silence alone. The Order enables a court to draw whatever inferences appear proper when the defendant remains silent in situations which clearly call for an explanation. The Order has made a significant contribution to dealing with serious crime, both terrorist and non-terrorist.

The Murray decision of the European Court of Human Rights

In the case of Murray v the United Kingdom, the European Court of Human Rights found against the UK on the question of drawing inferences from silence while a suspect is denied access to legal advice. The judgement has implications for both criminal and emergency law and wide consultation within Government has been necessary.

A number of options have been studied and the Government hopes to be in a position to announce a detailed response in the near future. It should be noted that in recent years access to legal advice has been delayed in only a small number of cases in Northern Ireland; 13 occasions in 1996 compared to 706 occasions in 1990.

Confession Evidence

At paragraph 95(b) of his Report, Mr Cumaraswamy states that "the permissive EPA standard for admitting at trial confession evidence procured by psychological pressure, deprivation or other non-violent forms of coercion should be abolished".

While the law currently provides for a lower standard of proof for the admissibility of confession evidence in terrorist cases, that provision is under review . In practice judges apply the higher Police and Criminal Evidence Act (PACE) standard. The Government attaches the greatest importance to the protection of the rights of those held in police custody. A significant range of statutory and administrative safeguards to protect persons in police custody are in place. The introduction of video and audio recording will add to those safeguards. It should also be borne in mind that allegations of ill-treatment are thoroughly investigated

by the police. The Independent Commission for Police Complaints must supervise any case where there are allegations of serious injury and may supervise any other which is in the public interest. All complaints are investigated for any breach of discipline.

The Independent Commissioner for the Holding Centres, Sir Louis Blom-Cooper, and his deputy make frequent visits to the holding centres to monitor both conditions and procedures. Sir Louis' most recent Report shows yet again that neither he nor his deputy have found any cause for concern.

Diplock Courts

At paragraph 95(c) of his Report, Mr Cumaraswamy recommends that the right to trial by jury should be reinstated, with safeguards put into place to protect the integrity of jurors.

In principle, the British Government agreed with this recommendation, but it is easier said than done. Diplock Courts were introduced in Northern Ireland to safeguard the judicial process because of significant levels of intimidation against jurors and the returning of perverse verdicts. Added to this there is always the possibility of a jury splitting along sectarian lines. For these reasons the time has not yet come for a return to jury trials although the matter is kept under continual review.

It should also be pointed out that although the judge sits without a jury in court, all the principles of British justice have been maintained: trial in open court with the calling and cross-examining of witnesses; an onus on the prosecution to prove guilt beyond reasonable doubt; the right on the part of the accused to take legal action and be represented by a lawyer, and if necessary the provision of legal aid. There are also important additional safeguards in existence to ensure that justice is seen to be done. In the light of a conviction the Judge must provide a written judgement outlining the reasons for it. There is also an automatic right of appeal on both points of law and fact and all such appeals are considered by the Appeal Court which comprises three judges.

There is no evidence whatsoever that the present system of a single Judge has in any way led to perverse verdicts or to a lowering of standards to the detriment of defendants. The safeguards of a written judgement and an automatic right of appeal to a three court judge preclude this.

Concerning The Issues Of "Bugging"

Mr Cumaraswamy refers specifically to criticisms of part III of the Police Act 1997 voiced by non-governmental organisations that it is viewed as "narrowly drafted". Part III of the Police Act 1997 was specifically intended only to provide for the authorisation of Police and Customs intrusive surveillance operations involving interference with property or wireless telegraphy. It should be seen as a first step in regulating surveillance operations undertaken by UK law enforcement agencies.

Consideration is already being given to what other safeguards and procedures are necessary to cover other forms of surveillance which presently come within the terms of Home Office guidelines.

Part III puts operations involving interference with property on a clear statutory basis and introduces a number of safeguards against inappropriate use of the provisions. These safeguards include independent oversight of the authorisation process and investigation of complaints by a Chief Commissioner and Commissioners, all of whom must hold or have held high judicial office. It will provide an effective statutory basis for important law enforcement techniques, whilst safeguarding individual liberties.

The Act contains no specific exemptions for certain categories of information. Mr Cumaraswamy acknowledges our view that such exemptions would create loop-holes which criminals would be sure to exploit. However, the Act does incorporate special procedures which take full account of the sensitivity and need for particular care where questions of legal privilege are likely to arise. Section 97 of the Act requires that the approval of an independent Commissioner must, save in cases of urgency, be given to an authorisation believed likely to result in the acquiring of matters subject to legal privilege. Section 98 of the Act provides further clarification of "Matters subject to legal privilege" and Section 103 outlines the remedies available to independent Commissioners to quash authorisations and order destruction of records where required approval requirements are not applied.

The draft code of practice, which supports the provisions, does not describe the concept of legal privilege in greater detail. Terms such as "legal privilege" are constantly being redefined by the courts. The addition of a free standing definition in the code would quickly become out of date and would need constant updating.

Neither does the code of practice explicitly provide for the destruction of legally privileged material. Statutory disclosure requirements contained in the Criminal Procedure and Investigations Act 1996 and compliance with data protection obligations impact on this issue. The draft code already makes clear that material obtained by intrusive surveillance which is wholly unrelated to a criminal investigation or to any person who is the subject of the investigation, where there is no reason to believe relevance to future proceedings, should be destroyed immediately.

Mr Cumaraswamy has drawn attention to the statutory regime for authorisation which exists in New Zealand. However, direct comparisons of this type are not always helpful. Different jurisdictions have approached this issue in a variety of ways, reflecting their own criminal justice police systems. The approach taken in part III fully reflects the structure of the regional policing system in the United Kingdom (New Zealand has a national police force). It ensures accountability for decision making, building upon the independence and responsibility of chief officers and fully utilising their unique operational experience and knowledge. It also incorporates an element of independent oversight in the form of surveillance Commissioners, who are required to be senior retired or serving judicial figures.

For the reasons outlined above, we disagree with Mr Cumaraswamy's conclusion that part III of the Police Act is too vague and requires amendment to ensure scrupulous respect for lawyer/client relations. The authorisation mechanism is based upon a number of significant statutory safeguards which fully acknowledge the importance of legally privileged material, striking an important balance between operational effectiveness and individual freedoms. The UK Government is fully committed to implementing these important provisions and will do so at the earliest opportunity.

Concerning The Police Ombudsman

Turning to the Special Rapporteur's recommendations in Paragraph 90 (a) that "the authorities, preferably the police Ombudsman, conduct an independent and impartial investigation of all threats to legal counsel in Northern Ireland"

As mentioned if we receive evidence of such action we will ensure that it is acted upon. The Chief Constable has already said that he will do so.

We do not understand recommendation 91 (b) "where there is a threat to the physical integrity of a solicitor or barrister, irrespective from whom the threat emanates, the Government should provide the necessary protection and should vigorously investigate the threats and bring to justice the guilty party"

The Government already seeks to fulfil its duty to protect all of its citizens. The police and the ICPC will also investigate threats and where possible bring to justice those who are guilty. However, I repeat that full co-operation is necessary.

It is worth saying in this context that our experience of complaints is that there are often two different versions of events and it can be a difficult task to get at the truth. But, there is a determination to attempt to do this.

The Government welcomes Mr Cumaraswamy's comments on Royal Ulster Constabulary training, which we are sure the Chief Constable will look at carefully. We are sure such an approach, if tackled with good will on all sides would be a significant step forward.

Concerning The Judiciary

The Government attaches great importance to ensuring that effective arrangements are made to support the judiciary in the task of implementing the Human Rights Bill and giving effect to the Convention rights. The Judicial Studies Board is currently planning training programmes for members of the judiciary at all levels which will be delivered prior to the implementation of the legislation.

The Government is undertaking a review of the UK's position under various other human rights treaties and will announce its conclusions in due course.